CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

June 5, 2003

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:35 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Sheridan Downey, Pamela Karlan, Thomas Knox and Gordana Swanson were present.

Item #1. Approval of the Minutes of the May 9, 2003 Commission Meeting.

Commissioner Swanson moved approval of the Minutes. Commissioner Knox seconded the motion. Commissioners Downey, Karlan, Knox, Swanson and Chairman Randolph voted "aye." The motion carried unanimously.

Item #2. Public Comment.

There was no public comment regarding matters not on the agenda.

Item #3. Adoption of Proposed Amendments to Regulation 18404.1, Clarification of Procedures for Seeking Extensions of Time from Executive Director to Terminate Committees.

Staff Counsel Holly Armstrong explained that this proposed regulation amendment clarified procedures for extending committee termination dates and set up a procedure for filing an appeal if the extension is denied by the Executive Director (ED). She noted that the need arose following the first wave of extension requests for committees that were due to terminate on December 31, 2002.

Ms. Armstrong explained that those requests for extension contained no evidence or justification for the extensions until after the request had been denied by the ED and were appealed to the Chairman. She pointed out that the proposed amendments to the regulation would require the committee to include any evidence supporting those factors with its initial request for an extension.

Ms. Armstrong stated that the proposed amendment would require the ED to notify the committee making the extension request of the ED's decision within 15 days from receipt of the request. The proposed regulation would also add a requirement that, if the request for extension is denied, the ED must specify the reason for the denial and must advise the committee of its right to appeal that decision to the Chairman. She noted that the proposed amendment would replace a subjective factor that the ED must consider when granting or denying a request with a less subjective factor that would require committees to have raised significant funds in the

previous 6 months toward its debts. It would also require that all of the committee campaign statements had been filed.

Ms. Armstrong explained that the proposed amendment specified the notice the ED must give to a committee regarding its appeal rights if an extension is denied. The ED will be required to set a deadline, no less than 10 days after the date the notification is transmitted, by which an appeal must be filed, and must notify the committee of that date. She explained that there was currently no procedure for appealing those denials.

Ms. Armstrong explained that when committees submit an appeal to a denial of extension, they will be required to include all the evidence that was submitted with the initial request for extension, under the proposed amendment. The appeal must directly address the reasons for the denial of the extension as outlined in the ED's notification of the denial. She noted that the ED has, in the past, provided committees with a reason for the denial, but the committees were not required to address those reasons in their appeal.

Ms. Armstrong stated that Decision 1 involved whether requests for extension should be submitted to the ED 45 days or 60 days before the committee's original termination date. Staff recommended 45 days, because 60 days presented an appearance that the committee is spending more time planning for the extension of time than preparing for the committee's termination.

Ms. Armstrong stated that Decision 2 would provide an automatic denial of any request for extension that is filed after the deadline, but provides the ED with discretion to waive the automatic denial upon a showing of good cause. If the automatic denial is waived by the ED and the extension subsequently denied by the ED, that denial may not be appealed to the Chairman under the proposed amendment.

Commissioner Knox questioned whether the word "or" on page 3 line 13 of the proposed amendment should be changed to "of."

Ms. Armstrong responded that it should be "of."

Ms. Armstrong stated that staff recommended adoption of Decision 2 because late requests for extension severely impact the timing of the review process. She noted that the ED should have discretion to waive the automatic denial where good cause is shown, but that it could easily result in the Chairman having only a few days to review an appeal. Therefore staff recommended that there be no right to appeal for late-filed extension requests that are denied by the ED.

Commissioner Karlan asked whether the ED should also have the discretion to permit an appeal, noting that the ED may want the Chair to consider the issue if it would help in the development of standards for extensions.

Ms. Armstrong responded that the regulation could be written that way, and suggested that the language require the Chairman's consent to the appeal.

General Counsel Luisa Mechaca pointed out that the proposed amendment would allow the Chairman at least 10 days to consider the appeal. If the ED was given the discretion to allow an appeal, she suggested that either the Chairman could waive the 10 day period, or some other language assuring that the process could be completed be included.

Commissioner Downey suggested that the ED could define the period in which any appeal must be submitted.

In response to a question, Executive Director Mark Krausse explained that there were many different scenarios with the submission of extension requests and appeals. He liked the idea that there could be no appeals to the Chairman unless the Chairman determined that there was good cause.

Ms. Armstrong noted that the Chairman would then be involved in the process before the appeal even begins.

Commissioner Karlan agreed, noting that the ED should make the decision to allow an appeal because the ED is already well-informed about the extension request.

Mr. Krausse responded that the Chairman could cite the fact that the extension request was late as the reason for denying an appeal request.

Commissioner Karlan stated that the only reason to allow an appeal would be if it would benefit the ED to have a final determination over whether there was good cause for the extension of the committee, as opposed to good cause for the appeal of the denial.

Chairman Randolph supported language that would allow the ED discretion to allow for an appeal, if it considered a time limitation to allow the Chair a minimum amount of time to consider the appeal.

Mr. Krausse explained that there are currently many committees that need to be terminated.

Chairman Randolph stated that the ED should be able to grant an appeal to a late-filed request if there is still time for an appeal. However, there must be a cut-off so that committees are not begging the Chairman to consider their appeal at the last minute.

Commissioner Karlan noted that was the reason why she did not believe that the Chair should make the decision as to whether to consider an appeal. She clarified the extension request timeline, noting that: (1) the committee would have to file a request for an extension 45 days prior to the termination date of the committee; (2) the ED would have 15 days from receipt of the request to decide the request for extension; (3) the committee would then have 10 days to file an appeal; and (4) the Chairman would then have 20 days before the committee termination date to consider the appeal.

Ms. Armstrong agreed, noting that staff built in 5 days for mailing in the timeline.

Commissioner Karlan observed that it left the Chairman with 15 days for the appeal. She suggested that the language allow the ED to grant an appeal if the ED thought it was desireable to do so, providing the appeal could be filed with the Chairman no later than 15 days before the termination date of the committee. This would allow the Chairman the same amount of time to consider the appeal that would have been available if the extension had been requested in a timely fashion.

Chairman Randolph asked whether the 5 days for mailing would be necessary if the Commission adopts decision point 3.

Ms. Armstrong stated that CCP 1013 provides that an additional 2 days be added when service is by fax or overnight mail, but she was uncertain of the time required to be added for service by certified mail.

Chairman Randolph suggested that the language read, "so long as the appeal is received."

Commissioner Karlan suggested that the language read, "is personally received by the Chairman no later than 15 days before the termination day."

Chairman Randolph suggested that 10 days would be sufficient.

Ms. Armstrong stated that if the Commission adopted the 45-day timeline and Decision 3, it would allow about 5 days "wiggle room," which would not give them much time to be late.

Commissioner Karlan pointed out that the committees currently have 10 days to prepare an appeal, but that they might be able to prepare it in a much shorter time. She added that, if the ED thought it important for the Chair to review the appeal, and the committee can comply with a limited amount of time for filing the appeal, it would not affect the amount of time the Chairman has to review the appeal.

Ms. Menchaca stated that the appeal can occur provided that all of the timelines in the regulation can be met, or that it could be up to the ED's discretion to establish a timeline. In either case, the language could be amended.

Commissioner Swanson liked the idea of short timelines, but was concerned that the appeal goes only to the Chair. She asked how the timeline would be affected if the Commission instead of the Chair reviewed the appeals. She believed that it was important to decide the extensions expeditiously, but believed that the appeals should be handled publicly by the Commission.

Mr. Krausse responded that it could reduce the number of appeals, because committees might not be as willing to ask for the extensions so publicly. He noted that the first requests for extension included some requests that were denied by the ED and then granted on appeal by the Chair because it was the first time the committees were required to be terminated. He explained that

the committees requesting extension included one that had not filed a campaign report since 1996, and needed to keep the committee open in order to pay the candidate back for loans. He believed that the Chairman should make those determinations.

Chairman Randolph agreed that it would be cumbersome to bring the appeals to the Commission.

Ms. Menchaca stated that opinion requests take about 45 days for the Commission's consideration because of the timing of the notice for the Commission meetings. Committees who know 90-days in advance that they will need the extension could use that procedure, but it would be difficult for other committees.

Chairman Randolph pointed out that there are specific provisions in the regulation giving guidance to the ED and the Chair regarding what to consider when making those decisions. She believed those provisions should lessen the likelihood of unsupportable decisions. Ms. Armstrong noted that there had been no public comment or complaint about that portion of the regulation.

Commissioner Knox suggested that the following language be added to page 3, line 14 of the proposed regulation, "unless such appeal is authorized in writing by the Executive Director. The Executive Director's authorization of such appeal, if given, shall specify the date by which such appeal must be filed with the Commission."

Chairman Randolph suggested that the language include a deadline.

Commissioner Knox responded that the ED works for the Chairman and that the deadline would not be necessary.

Chairman Randolph stated that a deadline would let the committees know that they had a specific time with which to file their request for an appeal.

Ms. Armstrong stated that it would be important to do so, because that was the issue that prompted the proposed amendments.

After further discussion, Commissioner Knox suggested that the language at the end of line 14 read, "unless such appeal is authorized in writing by the Executive Director. The Executive Director's authorization of such appeal, if given, shall specify a date no less than 10 days before the termination deadline by which such appeal must be filed with the Commission."

Commissioner Downey stated that he liked the idea of the ED fixing the time of appeal, although he agreed that the proposal had the advantage of a "bright line" rule.

Mr. Krausse pointed out that the "no less than" language allows the ED some flexibility but provides a delimiter so that the committees will know that they should not bother to request the appeal if there are less than 10 days until the committee's termination deadline.

Chairman Randolph stated that it should not be completely up to the ED to grant the appeal without the deadline, because it was important to give the Chair sufficient time to consider the appeal.

Ms. Menchaca suggested that line 17 of the proposed regulation be changed to give the ED 10 days, instead of 15 days, to notify the committee of the ED's decision, in order to make the timeline for the appeal work.

Commissioner Karlan stated that the ED could grant a request for an extension when the request for extension arrived 1 day late, but could limit the amount of time that the committee has to file their appeal. She believed that the proposed language would deal with Ms. Menchaca's concern.

There was no objection from the Commission to the 45-day option in Decision 1.

Chairman Randolph stated that Decision 3's only downside was that persons who submitted their request by mail would not be in compliance.

Mr. Krausse remarked that the provision was written this way because some requests for extension were claimed to have been filed but were never received by the FPPC.

Chairman Randolph agreed that the requirement should not be a problem.

In response to a question, Ms. Armstrong stated that it was against Commission policy to accept documents by electronic mail.

Commissioner Karlan noted that certified mail deals with the problem outlined by Mr. Krausse, but did not deal with the timeliness issue, and could cause delays. She suggested that overnight mail would provide both proof that the request was received and a guarantee that the request would reach the FPPC in a timely fashion.

Ms. Armstrong stated that costs were a concern with the overnight mail option.

In response to a question, Ms. Armstrong stated that the CCP mentioned all of the proposed options.

In response to a question, Ms. Armstrong stated that timeliness was an issue, but confirmation was also an issue.

Commissioner Downey agreed with Commissioner Karlan's concern. He suggested that appeals be filed in person, by fax or by overnight delivery service.

Chairman Randolph agreed, noting that faxing was the easiest method of delivery anyway.

Commissioner Karlan noted that faxing was also less expensive.

In response to a request, Ms. Armstrong summarized the following Commission decisions up to this point in the discussion: that committees must file a request for extension 45 days prior to the termination of the committee; the following language be added to page 3, line 14, "unless such appeal is authorized in writing by the Executive Director. The Executive Director's authorization of such appeal, if given, shall specify a date no less than 10 days before the termination deadline." She noted that the word "or" or page 3 line 13 should not be changed to "of."

Chairman Randolph added the following language to the end of the sentence, "by which such an appeal must be filed."

Ms. Armstrong stated that the Commission also changed the language on page 4, line 15 to read, "Be submitted to the Commission offices either in person, by fax, or by overnight delivery service."

Commissioner Karlan moved that the proposed regulation be adopted with the proposed changes outlined by Ms. Armstrong.

Commissioner Swanson seconded the motion.

Commissioners Downey, Karlan, Knox, Swanson and Chairman Randolph voted, "aye." The motion carried by a unanimous vote.

Item #4. Pre-notice Discussion of Proposed Regulation 18951: Section 89519 – Surplus Funds.

Staff Counsel Scott Tocher explained that surplus funds are those funds held by a committee after the election for which the funds were raised and after the candidate has lost the election or left office. He explained that the "personal use" statutes limit the types of expenditures that can be made from funds raised by a committee, ensuring that the funds are not spent for personal use by the candidate or members of the committee. Section 89519 is a further restriction on that use.

Mr. Tocher explained that funds become surplus once they reach the "triggers" outlined in the statute. The rule would provide that, once funds become surplus, they cannot be used to make contributions to other candidates for offices in California. Those funds cannot be used to make contributions to party committees in California except for party building. Lastly, those funds cannot be used for future elections by that candidate. Surplus funds must be disposed of as outlined in the statute.

Mr. Tocher stated that the proposed regulation is a version of a 1990 regulation adopted by the Commission, which interpreted a slightly different law. However, that regulation never completed the rulemaking process. The proposed regulation incorporated some of the provisions of that 1990 regulation, staff advice since 1990, and addressed new issues that were not considered in 1990. He explained that the Commission did not need to make a final decision

regarding the options, noting that the Commission may choose to notice a version of the regulation which preserves those options in order to facilitate the receipt of public input.

Mr. Tocher stated that the statute applies to funds raised after January 1, 1989. He explained that subdivision (a) of the proposed regulation established jurisdiction, and that subdivision (a)(1), (2), and (3) describe 3 scenarios involving surplus fund issues. In (a)(1), an incumbent candidate could have surplus funds at two different times, the latter time being applicable. He gave the example of a termed-out legislator who leaves office in late November, noting that the funds would become surplus on that date. If the legislator was not facing term limits, and was defeated in the election, the funds would become surplus on December 31 of that year. If the legislator were defeated in the primary, the funds would become surplus when the candidate left office. He noted the language in the regulation cautions of the consequence if the candidate does not transfer the funds.

Mr. Tocher explained that subdivision (2) applies to withdrawn and non-incumbent defeated candidates. The language of subdivision (2) codifies past advice regarding withdrawn candidates.

In response to a question, Mr. Tocher explained that there is no formal requirement that notice be sent when a candidate decides to withdraw. He noted that, after the election, the candidate would be treated as a defeated candidate. The date the funds become surplus is the same for withdrawn and defeated candidates.

Commissioner Downey noted that it would become awkward when a candidate that has withdrawn wins in the primary election.

Mr. Krausse stated that the date for filing nomination papers is the practical date to know whether a candidate is in or out of the election. If the candidate withdraws prior to that date, the candidate would not be on the ballot.

In response to a question, Mr. Krausse stated that, if the candidate withdraws after the candidate's name appeared on the ballot, the question becomes more clouded.

Commissioner Randolph observed that it would make no difference whether the candidate withdrew or was defeated, because the funds become surplus at the same time for both scenarios.

Commissioner Knox noted that if there is no way to establish when someone withdraws from an election, the withdrawal language should not be included in the regulation.

Commissioner Karlan suggested that (a)(2) include "all other candidates."

Commissioner Knox stated that the word "withdrawal" seemed to have no precise meaning, and the trigger would be the defeat of the candidate.

Mr. Tocher stated that staff gets questions regarding withdrawn candidates and do not know whether the rules for defeated candidates apply to them.

Chairman Randolph suggested that subdivision (2) could be entitled, "Non-Incumbent Defeated Candidates" and could address defeated candidates, adding at the end that a candidate who withdraws is considered a defeated candidate.

Commissioner Knox agreed that would be better, but noted that there was still no formal way to withdraw.

Commissioner Karlan suggested that the language read, "all other persons who have been candidates for the office."

Commissioner Knox agreed that the suggestion would address his concerns.

Ms. Menchaca pointed out that it might affect subdivision (a)(3).

Chairman Randolph stated that it would work for the post-election period after a candidate is deceased, noting that the regulation would be consistent and all candidate's deadlines would be the same. However, if the Commission adopts option A of decision 1, there would need to be a separate date.

Commissioner Swanson stated that, when a candidate withdraws from a county election, the county clerk is notified by letter.

Mr. Tocher pointed out that the regulation will be applicable to local as well as statewide office holders. He suggested that subdivisions (a)(2) and (3) could be combined to provide a more specific description, while preserving the option to have the "immediately upon the death" language as a separate subdivision.

Commissioner Karlan stated that she saw no reason to adopt option A instead of option B.

Chairman Randolph agreed.

Mr. Tocher responded that it would codify staff advice, but agreed that it seemed unduly harsh.

Commissioner Knox asked who makes decisions regarding the disposition of the funds when the candidate dies.

Mr. Tocher responded that the Treasurer has the responsibility to file the reports and to affirm that the statements are correct and comply with the law. He believed that, in practice, the treasurer has had to make those decisions.

Ms. Menchaca stated that if it can be shown that there is an organized governing group, they would make the decisions, noting that it has happened in the past. She pointed out that option B

was not necessarily parallel to the post-election reporting period. If a candidate were to die in March and the election was in November, then the applicable date would be June 30 instead of December 31.

Commissioner Downey observed that option A is a concern because a literal reading of § 89519(a) compares two dates. The first is leaving office, the second is following the defeat of a candidate. He pointed out that a deceased candidate neither left office nor was defeated.

There was no objection to option B.

Commissioner Downey stated that sometimes candidates open their committees two years before an election, but decide not to file the nomination papers once they determine that they will not have a viable candidacy. He questioned when that candidate's funds become surplus. Other candidates file the papers and then "withdraw," but there is no definition of "withdraw," and it could be different for local and statewide candidates. He suggested that both groups need to be covered by the regulation.

Mr. Tocher responded that the Commission may have the opportunity to define "withdrawn."

Commissioner Downey questioned whether candidates who do not run for office are subject to the surplus funds statute.

Commissioner Karlan stated that the committee is established with respect to running for the election to a particular office at a particular election.

Mr. Tocher stated that an assemblymember who was running for a senate seat but decided not to run for the senate seat at the last minute would have surplus funds for the primary senate election after the post-election reporting period on June 30. The assemblymember's surplus funds would become surplus when they left office.

Commissioner Swanson stated that a candidate must have an identification number once they begin collecting money for the campaign.

Ms. Menchaca explained that it does not matter whether the nomination papers have been filed, if a committee is formed and contributions are received or expenditures made, the candidate is treated as a candidate. If someone writes in and says that they have withdrawn, the election for which they set up a committee would trigger when staff would tell them that the funds become surplus.

Commissioner Karlan asked whether a person could accept contributions without identifying which seat and which year they would be running for office.

Ms. Menchaca said they could not.

Chairman Randolph suggested that staff come back with an option that sets aside withdrawn candidates and defines them more clearly, or considers a withdrawn candidate to be a defeated candidate.

Commissioner Downey stated that he did not see how a candidate could be defeated if they never got on the ballot, and suggested that it be answered in the regulation.

Chairman Randolph summarized that Decision 1 option A should be eliminated, and option B should present a separate subsection for deceased candidates.

Ms. Menchaca noted that staff's goal was to allow some period of time after the death of a candidate to allow the committee to determine what to do with the funds, but not to extend it too far beyond the death of the candidate.

Mr. Tocher explained that subdivision (b) defined the end of the post-election reporting period and includes dates already in the statute. Subdivision (c) defines when the campaign funds are raised, identifying which funds the statute will regulate. Subdivision (d) codifies staff advice, and he expected that it will receive less and less attention because of the committee termination rules. It addresses the comingling of pre- and post- 1989 funds.

In response to a question, Mr. Tocher stated that there are committees which still have pre-1989 funds, but he did not know how often that occurred.

Mr. Tocher stated that subdivision (e) involved funds and committees not governed by § 89519, and gives the Commission the options of not considering their funds surplus funds (option A), or of providing the rules that would govern those funds. He noted that questions have arisen regarding this issue.

Chairman Randolph observed that option A and option B did not seem mutually exclusive, and suggested that both options could be included in the regulation.

Mr. Tocher agreed that they are not mutually exclusive, noting that option B is an extension of option A. He suggested that the statutory authority for option B could be in question because the elections code provision that used to address pre-1989 funds but was repealed by Proposition 208 created uncertainty with regard to the effect of the repeal of the repealing statute. Staff does not give advice on matters outside the Act, and, since this involved the election code, staff would direct the public to seek advice from the Attorney General's office with respect to those funds. The question of whether that election code provision was still in effect may be a reason to not adopt option B. He did not think it was a serious issue.

Ms. Menchaca stated that it was a policy decision as to whether all campaign funds under the PRA are governed by the Act. If there is no other law applicable, then the Commission can determine that they fall under the rules of § 89511 through § 89518.

Chairman Randolph observed that if a committee has non-comingled pre-1989 funds, the previous statute can be used.

Mr. Tocher agreed.

Chairman Randolph supported both options A and B, and suggested that staff present both options as well as a third option merging both sentences when it is brought back to the Commission.

Commissioner Knox suggested that subdivision (e)(3) be reconciled with (d), because subdivision (d) provides that funds raised prior to 1989 can be subject to the requirements of the regulation if the funds have been comingled. He believed that it should be made explicit that, per subdivision (d), funds raised before January 1, 1989 are subject to this section if they have been comingled.

Chairman Randolph suggested adding language at the end of subdivision (e)(3) providing, "that are not comingled with funds raised after January 1, 1989."

Commissioner Knox agreed.

The Commission adjourned for a short break at 10:51 a.m.

The Commission reconvened at 11:00 a.m.

Item #5. Pre-notice Discussion of Public Generally Regulations as Applied to General Plan Decisions.

a. Overview of Public Generally Regulations as Applied to General Plan Decisions.

Ms. Menchaca explained that this project was initiated at the request of the County of San Diego, which is undergoing a series of General Plan amendments. County officials indicated that some officials have been disqualified from participating in General Plan decisions under the provisions of the PRA. They asked that a special exception be crafted to increase their participation in General Plan decisions.

Ms. Menchaca stated that staff held several interested persons meetings to identify whether a need existed to amend existing regulations and to solicit public input. They contacted the League of California Cities and sent notices to cities and counties. She described the work by staff that was required to develop the proposals, noting that staff received input from the Governor's Office of Planning and Research. She explained that staff studied whether the 8th step of the Commission's 8-step analysis adequately addressed the concerns of San Diego County. She reminded the Commission that the Phase 2 project addressed 17 regulatory projects, 3 of which resulted in significant amendments to the public generally exception.

Ms. Menchaca stated that staff explored whether additional amendments were appropriate, and after some study, staff determined that they should focus on the public generally rules. Additionally, they determined that public education of the "segmentation process" could lead to better understanding of the Act's conflict of interest laws, and staff developed a proposal which would codify the "segmentation" staff advice.

Ms. Menchaca described the method that staff was using to present the proposals. She asked that the Commission keep in mind that San Diego County cited the collection of facts required to apply the public generally exception as an obstacle. Determining when public officials are affected in substantially the same manner as a significant segment of the public was especially difficult for them. She also noted that staff believed that existing regulations may be adequate to address the concerns voiced by San Diego County. Staff was uncertain how current regulations could be further refined without drafting regulations that could, potentially, swallow up the conflict of interest rules.

Ms. Menchaca pointed out that staff examined the issues without deviating from the Act's application of the conflict of interest rules as a financial test. She explained that the Act governed financial interests and that staff was governed by the parameters of the statutes. She noted that staff did not deviate from the Commission's treatment, since 1975, of "public generally" as an exception.

Ms. Menchaca opined that the "public generally" exception may be misunderstood by the public. It applies once an official is already disqualified, but members of the public may be skipping steps 4-6 of the 8-step analysis, resulting in the premature conclusion that they may not participate because they do not meet the "public generally" exception standards. Ms. Menchaca stated that this creates problems for staff when providing advice, and leaves staff uncertain that a regulatory amendment is necessary. Rather, implementation and application of the existing regulations may be the real issue.

Staff Counsel Natalie Bocanegra pointed out that governmental decisions are analyzed in steps 1-3 of the 8-step process, and that public officials may find that they can participate in decisions at the end of the third step. If not, steps 4-6 analyze what a "reasonably foreseeable financial effect" is, and often results in the conclusion that it is not reasonably foreseeable that the decision will have a financial effect, and the official can then participate in the decision without further analysis. If not, the official can then use the Commission's segmentation process to "segment" the conflicting decision from other related decisions, so that the official can participate in the other decisions even though the official may not be able to participate in the decision where the official has a disqualifying conflict.

Ms. Bocanegra explained that, if the public official is disqualified, the official can explore whether the "public generally" exception will apply to them. If the official's economic interest in real property is affected in substantially the same manner as 10% of the jurisdiction, or if 10% of the official's district is affected in substantially the same manner, the official may participate in the discussion because the "public generally" exception would apply.

Ms. Bocanegra pointed out that many officials who follow the 8-step process may find that they do not have a disqualifying conflict. Additionally, the regulations provide the "legally required participation" rule as another way through which the official can participate even if the official has a conflict.

Ms. Bocanegra stated that the San Diego issues involved conflicts that that were still considered disqualifying after following steps 1-6. She pointed out that the issues involved were not unique to general plan decisions. She urged the Commission to consider whether general plan decisions warrant a special rule.

Ms. Bocanegra outlined the seven elements of general plans, noting the land use element was the lynchpin element of the entire plan. She explained that general plans can be amended by private or public initiative, and they may affect part or all of a jurisdiction. Decisions are made to adopt or amend general plans, and advice letters have addressed general plan decisions impacting the whole jurisdiction, impacting a clearly identified parcel or area, or dealing with amendments initiated by private persons.

Ms. Bocanegra stated that staff explored ways to address the general plan issues at earlier steps of the 8-step process. She noted the *Sansone* advice letter, FPPC No. I-03-058 addressed the "downzoning" and "upzoning" of land, directly affecting 90-acres of land belonging to one public official, and 20-acres of land belonging to another public official.

Ms. Bocanegra discussed the analysis to determine whether the decision had a direct or indirect effect on the economic interest, noting that staff advice varies depending on the details of the decision or the nature of the economic interest. She pointed out that property directly involved in a decision is presumed to have a material effect, while property that is indirectly involved is presumed to not have a material effect. She explained that staff explored an approach that specified that certain general plan decisions would indirectly involve a public official's real property, resulting in the effect of the decision to be presumed to not be material. However members of the public believed that it did not resolve the problem because the materiality presumption could frequently be rebutted due to the nature of the general plan decisions.

Ms. Bocanegra explained that, when it was not reasonably foreseeable that the decision would have a material financial effect, a conflict of interest did not exist. She explained the two types of decisions involved in the *Stone* letters, as well as other types of decisions that might be involved in general plan decisions, noting that the type of decision (such as rezoning) could make the decision material. Staff explored developing special foreseeability rules for general plan decisions, but members of the public had little interest in that approach because they believed that those types of decisions would meet the foreseeability test, and the official would not be able to participate.

Ms. Bocanegra explained that "segmenting" decisions from a group of large and complex decisions can allow an official to participate in some of the decisions even though the official has a conflict in other decisions.

Ms. Bocanegra explained the "public generally" exception, noting that an official who still has a conflict after going through step-6 of the analysis can still participate if the effect of the decision on the public official is substantially the same as its effect on a significant segment of the public. This exception has been in existence since 1976. It requires that the number of people affected by the decision be counted to determine whether a significant segment is affected. It also requires that a determination be made to learn if the effect is substantially the same for the official as it is for the public. San Diego County has difficulty making the "substantially the same" analysis because it is difficult to collect data for comparison.

Ms. Bocanegra stated that advice letters dealing with "substantially the same" consider distance, unique or specific effects, the official's ownership of multiple properties, and the official's possession of types of economic interests beyond those held by the significant segment. She reviewed past letters, noting that staff believed the correct results were reached in the *Sansone* letter.

Ms. Bocanegra explained that local jurisdictions were never stopped from making a decision through the "legally required participation" rule.

Ms. Bocanegra summarized that the overview memorandum asked whether staff should pursue an alternative under steps 4 and 5, under step 6, or whether "substantially the same manner" should be defined using dollar thresholds.

c. <u>Pre-notice Discussion of Proposed Regulation 18702.6 – Segmentation Rules.</u>

Ms. Bocanegra stated that staff has advised on segmentation rules since 1986, and that the rules have a safeguard that would prevent its application when decisions are inextricably interrelated. Segmentation occurs when a land use map is broken into smaller maps so that decisions can be made for smaller areas and officials with conflicts can participate in decisions relating to the areas where they do not have a conflict. She presented the example in San Diego County addressed in the *Sansone* letter.

Ms. Bocanegra recommended that the segmentation process be codified, as presented in the proposed regulation. She explained that proposed 18702.6(a) outlined the segmentation procedure, 18702.6(b) clarified when decisions are inextricably interrelated, and 18702.6(c) codifies special rules relating to an agency's budget or general plan adoptions and amendments. The proposed regulation mirrored past advice.

Ms. Bocanegra stated that if the Commission decided that general plan decisions required a unique treatment in the regulations, it may best be addressed in the "public generally" step of the analysis. However, she urged the Commission to consider only a narrow broadening of the rules that would allow officials to participate when they have a conflict of interest, requiring a demonstration that the purposes of the Act would be promoted by the disqualified official's participation.

b. <u>Pre-notice Discussion: Adoption or Amendment to Conflict-of-Interest Regulations (General Plan Decisions).</u>

Staff Counsel Ken Glick presented three proposed amendments to the public generally exception. The proposals would define when it is appropriate for a public official with a conflict of interest to participate in a general plan decision. Mr. Glick noted that staff strongly recommended that the Commission not adopt the proposal by San Diego County. The two staff proposals had unresolved issues that would need to be addressed, and he asked for guidance from the Commission.

Mr. Glick explained that the San Diego proposed regulation 18707.10 included language that would permit a public official to participate in General Plan amendments applicable to the agency's entire jurisdiction or the official's entire election district. The proposal permits participation without requiring that the official assess the financial effects of the decision. It included a disqualification provision that San Diego believed protected against biased decision-making. However, it was a rebuttable presumption that was narrowly drawn, and FPPC staff believed it offered practically no protection to the public.

Mr. Glick stated that the Act requires that the financial effect of a decision be assessed, and that San Diego's proposed regulation 18707.10 ignores that requirement, and focuses on the applicability of the decision. He noted Enforcement Division's concern that the language would create a broad presumption that decisions of this nature would have no material financial effect upon public officials, and it would shift the burden of proof from the official to the Enforcement Division.. He believed that the San Diego proposal would change the current two-prong test for determining whether the public generally exception applied to a decision in a manner that would promote public confusion and make it more difficult to apply the "public generally" exception.

Mr. Glick presented four questions for the Commission's consideration:

1. Should "public generally" regulation be limited to decisions to adopt a general plan or should it also cover amendments. If so, what kind of amendments should be covered?

Mr. Glick stated that decisions to adopt a general plan or a component of a general plan to be of a policy nature, applying to an entire jurisdiction. He believed it more likely that the financial effect will be the same for the public official as it would be for the general public in those scenarios. Amendments often deal with a particular area or development, and he believed that financial effects on an official resulting from decisions to amend the general plan are more likely to be distinguishable from the financial effects on the public generally. He noted that a special exception only related to adopting decisions would not address all of the issues presented by the public.

2. Should the exception apply when the decisions affect any economic interest, or only the more commonly encountered interests (such as real property or a principal residence)?

Mr. Glick pointed out that the "public generally" exception should be narrowly construed because it is an exception. Staff believed that the regulation should limit the number of economic interests.

3. Is it necessary to have a stand-alone form of the "public generally" exception?

Mr. Glick suggested that the "significant segment" portion of the general rule could deal with the problem by offering more specificity. He noted that the staff proposal included an amendment to that portion of the general rule.

4. Is amending the "public generally" regulation the appropriate response to the concerns raised by San Diego and others?

Mr. Glick noted that segmentation or segmentation combined with public education might answer those concerns.

Mr. Glick explained that staff's proposed amendment to regulation 18707.1 would be applicable to any governmental decions that have a financial effect on an official's real property interests, and is not limited to general plan decisions. It provides factors for a public official to consider when analyzing "substantially similar," that are very similar to factors that can be used to rebut presumptions of materiality with respect to real property. The approach did not specifically define "substantially the same manner," but staff found it difficult to draft a universally applicable definition. A definition that applied in all instances would have to consider the wide range of potential general plan decisions and the multiplicity of circumstances in which decisions are made. The approach staff utilized would provide analytical tools that would help determine whether the "substantially similar" test was met. Mr. Glick explained that San Diego objected to the staff's approach, but noted that it would provide some specificity.

Mr. Glick presented Legal Division's proposed amendment to regulation 18707.10. He noted that staff did not agree that a stand-alone exception was necessary, but stated that staff drafted language in order to identify the issues that would be faced with a stand-alone exception.

Tom Harron, from San Diego County, stated that there are 1 million people in San Diego who are not represented in the general plan decisions because of conflicts. He believed their proposal balanced the interest for conflict-free decisions with the interest in public representation.

Commissioner Downey noted that San Diego was proposing that, even though there are conflicts, there is a counter-balancing need to justify allowing the official to participate in the decision when a, perhaps signficant, conflict of interest exists.

Mr. Harron concurred, noting that there are unique circumstances involved in the development of a comprehensive general plan amendment, and that land use regulations apply to everyone.

Chairman Randolph observed that the process started by addressing general plan decisions that are wide in scope and required by law. She noted that general land use regulations are completely different.

Mr. Harron responded that they are similar in that the policies and criteria apply across-the-board, and not to a particular property. They are adopted for pure planning purposes, and not for purposes of approving a development. He noted that the general plan amendment affects every single property in an area the size of Connecticut. Because it is written for purely planning purposes, it would not set bad precedent.

Mr. Harron stated that, if staff's proposed factors are adopted, experts would have to determine whether the factors were met. He explained that it is very difficult to apply those factors to raw land and noted that his interpretation of the factors might not be the same as FPPC staff interpretations, and could result in an enforcement action against them. Mr. Harron stated that both the interests in representative government and conflict-free decision making can be accommodated in the regulation.

Mr. Harron noted that FPPC staff have been very cooperative throughout the process and have given San Diego the opportunity to provide full input. He also explained that the County of Madera voted to support San Diego's position on the issues.

Commissioner Knox observed that regulation 18707.1 defines "significant segment" and then addresses "substantially the same manner." He asked whether San Diego was seeking guidance regarding "substantially the same manner" since the "significant segment" portion of the test appeared to be met.

Mr. Harron responded that the financial effect test was clear and that their officials did not meet the test. He argued that "substantially the same manner" should address whether they were being downzoned, upzoned, or whether fees were being imposed on them. Staff's position was that they take the test even further and ascertain how much of a financial benefit would be derived from the decision. He explained that their general plan decisions involved many parcels that were being downzoned or upzoned, but that everyone was being treated the same. If public officials own more than their own residence in their jurisdiction, they are not going to be able to participate by using staff's test. He agreed that they should not participate when a development approval was being considered, but did not agree that the public official should not participate when the decision involved pure planning that would apply to everyone across-the-board.

Mr. Harron explained that one of the two San Diego officials involved in the issue owned an avocado farm, and the other owned an oat hay farm. He pointed out that there are many factors to consider when determining whether a decision will have a financial effect on the land and that it can be very expensive to make those determinations. The only way someone will go to that expense is if they want to develop the property and a public official would not want to bear that expense just to participate in the decision.

In response to a question, Mr. Harron stated that the decisions are first presented to the 7-member County Planning Commission for approval and are then sent to the 5-member Board of Supervisors for approval. All of the public officials would be affected by the decision. He noted that there was tremendous public interest and input on the general plan.

Mr. Harron stated that all counties should have general plans, and that there will always be amendments to those plans. He asked whether the regulation should apply to comprehensive general plans that are undertaken outside of development approvals, or to plans associated with development approvals. He believed it should not apply to plans associated with development approvals.

In response to a question, Mr. Harron explained that he believed the avocado farmer would be affected in substantially the same manner as the public generally. The farmer was being upzoned along with over 10,000 other properties. His office believed that the effect was substantially the same, because the effect of an upzoning is to increase the value of property, while the effect of downzoning is to decrease the value of that property. Therefore everyone whose property was being upzoned or downzoned had the same effect on their property.

In response to a question, Ms. Bocanegra stated that staff compared how much property was being affected. Since the two San Diego officials owned more land than those people with only a primary residence, staff believed the financial effect was not substantially the same.

Commissioner Knox asked what standard was used to determine average ownership for purposes of determining "substantially the same".

Ms. Menchaca responded that there were zoning issues involving various acreage tiers, and that the officials were not being compared with 9,000 other landowners, but rather with a much smaller number of landowners who were impacted by the zoning changes. When zoning is changed to allow 1 unit per 4 acres, an official who owns only 2 acres could receive a very different financial effect than the official who owns 90 acres.

Commissioner Knox pointed out that the comparison is not between the officials, but is between the official and the rest of the significant segment.

Ms. Menchaca agreed.

Chairman Randolph stated that, as commonly applied, officials identify their economic interest, then the significant segment. If the official cannot identify a significant segment with a comparable economic interest, then the "substantially the same manner" test cannot be met. If an official owns a 12-acre residential parcel where most residential parcels are 1 or 2 acres, then the test would not be met.

Ms. Menchaca stated that the number of parcels is not necessarily representative of 10% of the property owners. Parcels may be rented out and the impact on the owners may be different than it would be for a tenant.

Commissioner Karlan observed that San Diego was using everyone who was being upzoned as a segment, while staff was looking at who had the same type of property. She asked whether the analysis asks whether the official is being affected in the same way as other individuals. There seemed to be confusion in deciding both what the segments areas well as whether the official is being similarly affected within those segments.

Chairman Randolph agreed, noting that if a significant segment is identified, but the official is not part of the significant segment, then the official does not meet the "substantially the same manner" test. To avoid that problem, officials look for a different segment whose economic interest is similar to the official.

Commissioner Karlan asked whether it should be measured in absolute or relative terms. She explained that San Diego might argue that the financial effect would be substantially the same when every parcel that is being downzoned receives a 10% devaluation. Staff seemed to argue that the size of the parcel should be considered, and the 10% devaluation would be much more for the 90-acre parcel than it would be for a 1 acre parcel, and therefore the effect would not be substantially the same. She questioned where the authority came from to make the determination in either an absolute or relative sense, and whether it should be defined at the "segment" or "similarly situated" stage. She suggested that clarifying those issues would help in determining whether a problem existed and could be dealt with.

Chairman Randolph stated that, if "substantially the same manner" is more clearly defined to delineate an absolute or relative analysis, the same result may occur, but at least the language would be clear. She noted that general plan amendments can take one, two, or three years, and questioned when the segmentation would occur in the process.

Mr. Harron stated that the issue is further complicated in other ways. Several persons may have the same amount of acreage, but many other issues can impact the financial effect. He believed it was nearly impossible for officials to do true comparison of those issues when dealing with an area the size of Connecticut.

In response to a question, Mr. Harron stated that an analysis of a 30-acre parcel that was being downzoned would be meaningless if it was not economically feasible to develop the parcel in the first place.

Commissioner Knox stated that the issues presented by the Chairman seemed to involve a combining of the "significant segment" and "substantially the same manner" elements, but may conflict with the approach in the regulation. He agreed that it made sense to first determine the significant segment simply on the proportion of people or properties affected. Attention should then be turned to determining what "substantially the same manner" is, and, if there are not enough 90-acre parcels to qualify as a "significant segment," the 90-acre property owner should not be penalized.

Assistant General Counsel John Wallace explained that staff believed the *Sansone* letter reached the right conclusion. He clarified that the issue involved not just upzoning and downzoning, but also various categories that allowed more upzoning in certain categories and less in others. Taking all of the factors into account, and the very large land holdings of the public officials, staff did not believe that the scenario would ever qualify the official for the exception. Staff was developing the regulation to deal with scenarios where a person owns something very common, such as a personal residence, and should not be disqualified. The general rules should deal with many of those situations. However, he pointed out that it seemed problematic to find the official is not being affected differently when the official is affected 90 times more than the official's neighbors.

Commissioner Karlan pointed out that, when one parcel is three times larger than another, it may not be accurate to say that the larger parcel is going to receive a financial effect three times larger than the smaller parcel. She noted that it would be relative to the base line from which they are starting. She found the issue and the *Sansone* letter confusing because she could not ascertain what the segments were. The county believed that all property owners in the unincorporated part of the county were in the same segment, while the FPPC staff disagreed, believing it was persons with similarly situated sized parcels to which the particular zoning change would be applied.

Chairman Randolph disagreed. She understood the concept to be that the significant segment can be identified as everyone who is upzoned or downzoned, but that if that is done without regard to the different economic interests then there are problems with the "substantially the same manner" test. In practice, people try to avoid those problems by trying to identify a significant segment where everyone is the same, shortcutting step b.

Commissioner Karlan observed that it suggested that the two-step process was already undermined because people were not performing the two steps but were collapsing them into one step in order to provide an answer.

Mr. Wallace pointed out that staff has never required mathematical precision. They have never required appraisals, and during Phase 2 the Commission moved away from requiring dollar thresholds because they did not want that type of requirement. The "factors" test is a good-faith effort to look at the factors in the similarities of property. He did not believe it fair to say that the "public generally" exception never applies in these settings. He asked the Commission to provide guidance regarding where the line should be in general plan decisions, noting that he did not believe the exception should apply in all general plan decisions.

Chairman Randolph observed that the Commission did not want to consider an "indirect" or "direct" rule to resolve the issue, nor did they want to address it in the foreseeability context.

Commissioner Knox asked whether staff's approach would provide that an owner of 10 acres would never be able to establish that the effect was substantially the same when the other owners had only 1 acre.

Ms. Menchaca responded that if the financial effect was 10 times greater that would be true. It would not be a presumption, but staff is often not presented with facts to show otherwise.

In response to a question, Ms. Menchaca stated that an approach based on proportionality was not a concern when the economic interest was a single interest, such as a residence. However, other considerations should be discussed before moving to a proportionality test. She pointed out that proportionality is used when there is a clear legislative mandate that the district accomplish particular objectives because the owners are usually the only ones that get to vote in the district. If they are excluded from the process the district cannot function. In the "landlord-tenant" regulation, the proportionality concept is used but is limited to residential property. She did not rule out a proportionality approach, but cautioned that it must be carefully analyzed to make sure it did not create unintended consequences.

Commissioner Knox questioned whether it was presumed that the 80-acre avocado farmer, in the San Diego example, would not have been affected in substantially the same manner in the upzoning as an 8-acre property owner would be, because he had 10 times more land.

Ms. Bocanegra agreed, noting that the decision was based on the upzoning categories and development potential of the property.

Ms. Menchaca clarified that it was not a presumption. In this case, the material financial effect had already been demonstrated.

Robert Westmeyer, Napa County Counsel, stated that Napa is heavily involved in land use. When San Diego brought up this issue, Napa had a stream setback ordinance before them, which would have applied to every property in the county. Supervisor Dillon did not own any property in the county, but had a substantial number of clients who owned property in the county as a member of a law firm. This created an indirect economic interest for Supervisor Dillon, and he questioned whether that should prevent the Supervisor from participating in that decision. He believed it created a monumental problem.

Mr. Westmeyer stated that the commission's interpretation of the public generally exception was wrong. He explained that virtually every property in the county is subject to the general plan or zoning changes, and the supervisor would not be able to vote on the issue because they would not be able to collect the data necessary to make the determination. The end result is that the FPPC is telling the entire state of California that general plan amendments that apply to everyone cannot be voted on. If there is a general plan amendment that only involves 1 property, and the 5,000 parcel figure can be developed, then maybe it can be voted on by applying the general plan exception. He believed that the Commission should decide, as a policy matter, whether supervisors and city council people with conflicts would be allowed to vote on matters that apply to every single parcel in the county. The stream setback issue required that the parcels be segmented by setbacks, and then compared with the economic interest of the supervisors. Mr. Westmeyer believed that this was an impossible burden. He stated that, under the guise of the regulation, the Commission is telling jurisdictions that they can never vote on a general plan

amendment because they can never come up with the data the Commission requires to deal with the "substantially similar manner."

Mr. Westmeyer pointed out that staff interpreted the regulation as saying it must be in substantially the same degree, not substantially the same manner. He believed that every property in Napa county that had a stream on their property was affected in substantially the same manner. However, FPPC staff read the regulation to mean substantially the same degree when they required that it be segmented by setbacks. He urged the Commission to have the "public generally" exception apply in situations where he believed it was intended to apply. He would support limiting the exception to adoption of general plan amendments where adoption of every element of the general plan had to be amended at the same time so that it is clear that it is only going to affect general planning. He urged the Commission to expand the San Diego proposal to include zoning changes because they are substantially the same as general plan changes.

In response to a question, Mr. Westmeyer clarified that the stream setback ordinance applied to every property in the county with a stream on it. This would involve 9,000 parcels out of about 15,000. He agreed that they had met the "significant segment" test. However, staff broke those down into 3 segments, so the 5,000 person test might not be met. He explained that the issue was further complicated when properties had more than 1 stream on them. The end result was that it was impossible, as a practical matter, to gather the facts necessary to qualify for the exception and be able to vote. He did not think that was the purpose of the exception.

Commissioner Swanson left the meeting at 12:22 p.m.

Chairman Randolph expressed concern about extending the discussion to include all land use regulations. She pointed out that Mr. Westmeyer first indicated that the issue was about a land use regulation that applied to every parcel in the county, then quantified it to say it involved every parcel in the county with a stream. Since the discussion involved setbacks on residential properties, then the issue only involved residential properties, cutting back the number of parcels that would be affected even further, which would significantly broaden the scope of exception if it applied to all land use regulations.

Mr. Westmeyer responded that a general plan with an agricultural policy would apply to the entire county, but would not apply to those parts of the county that are zoned commercial or non-agricultural. He noted that comprehensive general plan amendments would have policies in them that do not apply county-wide.

Chairman Randolph stated that the general plan discussion involved overall, interrelated policy decisions regarding various issues throughout the jurisdiction. A zoning regulation, however, was much more specific discussion.

Commissioner Karlan noted that when a supervisor's clients are disproportionately affected by a regulation that applies to only part of the county they should be disqualified from participating.

She believed this to be much different from disqualifying someone who has a residence in the jurisdiction.

Commissioner Swanson returned to the meeting at 12:25 p.m.

Mr. Westmeyer argued that the "public generally" exception was created to allow that, if everyone was affected in pretty much the same way, they should be able to vote even if the official or the official's economic interest are similarly affected. He noted that when they are all affected in the same manner, and not necessarily to the same degree, that should satisfy the purpose of the exception. He stated that the current interpretations and regulations vitiate that totally and eliminate people from being able to vote in that context, unless it is a very discreet general plan amendment where a segment could be found that would make it work.

Chairman Randolph questioned whether the resolution could be found in the "substantially the same manner" test, and not necessarily by a separate "public generally" exception for zoning or general plans.

Mr. Westmeyer responded that he did not necessarily agree, but believed that staff would see the exception as too broad and would want to see an exception placed in a general plan and zoning section of the regulations that only applies when the decision would involve virtually the entire county. He noted that it would not be a regulation that involved a general plan designation that applies to the whole county because it really only affected 3 parcels.

Commissioner Knox stated that, if the county has 15,000 parcels, 9,000 of which have creeks. Of those, there are 3 classes of creeks, and he suggested that each would have 1/3 of the creeks for purposes of the example.

Mr. Westmeyer stated that no one knew how many parcels are in each class of creek.

In response to a question, Mr. Westmeyer stated that the property owner would not necessarily know what class of stream was on their property. He believed that, since all of the setbacks were increasing, everyone was being affected in substantially the same manner. He did not believe that the official should have to look at the degree of the effect through the 3 different classes of creeks. He noted that the class 3 streams were on slopes that were severe and required greater setbacks.

Commissioner Knox asked whether the county could define a significant segment since they did not know what the impact of the ordinance will be.

Mr. Westmeyer responded that they could define a significant segment to the extent that they could identify the parcels with streams. All 9,000 of the parcels with streams would be treated the same in that they would all have increased setbacks, but the amount of the setback would vary depending on the class of the stream.

Napa County Supervisor Diane Dillon clarified that a biologist can determine whether a stream is class 3. She noted that the setback ordinance applied to 9,000 parcels as they are currently configured, but that those parcels may change. If a significant number of the parcels merge, as had happened in the past, she believed it was conceivable that the ordinance could apply to the whole county. For this reason, she agreed that a zoning ordinance that applies county-wide should be considered the same as a general plan amendment.

Supervisor Dillon explained that she was with the Napa County Board of Supervisors for 5 months, and represented the district that includes about 60% of the unincorporated land in the county. the people in her district were not represented when she could not vote on the ordinance. She explained that she had no real property interests in the unincorporated area. She was one of 7 partners in a law firm before becoming a Supervisor and was advised by the FPPC last year that clients who paid the firm $3,500 or more during the 12 month "look back period" would be considered sources of income to her. As of December 31, 2002, she had no financial interest in the law firm at all.

Supervisor Dillon stated that FPPC staff advised her that the regulations did not allow the "public generally" exception to apply to her. She pointed out that, while her 12-month "look back period" was shrinking, it was not shrinking by 1/12 each month because many clients wait until the end of the year to pay the law firm.

Supervisor Dillon explained that Napa's analysis led them to believe that her situation met the "significant segment" test of the "public generally" exception, and that all of the parcels and streams were affected in substantially the same manner. FPPC staff disagreed, suggesting instead that her indirect real property interest might allow the presumption that she did not have disqualifying conflict. Staff asked that she prove that the presumption was not overcome by looking at every parcel affected by the proposed ordinance and comparing each of them to her economic interests, similar to what she would need to do for the "public generally" exception. She explained that the county cannot create the significant segment for comparison. Additionally, since she is not at the law firm anymore, she does not know what real property is owned by the clients of the law firm. The partners of the firm would not be able to tell her because they may not know, and even if they did know it might violate attorney-client privilege to share that information with her. She questioned how she could have a conflict concerning something about which she had no knowledge nor any possibility of obtaining that knowledge. She noted that the FPPC's mission was to promote the integrity of representative local government through fair and impartial interpretation and enforcement of the conflict of interest laws. She did not believe that the result in her scenario was fair to the residents of Napa County who want representation.

Supervisor Dillon urged the Commission to adopt the San Diego or Napa County proposals. She noted that her situation did not involve just one vote, but that a lawsuit had been filed regarding the issues and she was not able to participate in the closed session discussion of that litigation. There is a referendum on the ordinance and she cannot participate in any of those discussions.

Supervisor Dillon did not believe that the only option was looking at the setbacks. She explained that, if there were 5,000 people with class 3 streams on their parcels, it would then have to be broken down by the number of acres on the parcel. She questioned what level would have to be met to define "substantially the same manner."

Supervisor Dillon stated that version 2, which would exempt any general plan amendment that involved the land use element (which is the core of the general plan), does not begin to address the problem. She asked that any regulation include some examples of how it might apply. Specifically, she asked how the public is supposed to determine financial effects other than by getting appraisals.

Commissioner Karlan asked staff why step 6 of the 8-step process would not take Supervisor Dillon out of a conflict situation.

Mr. Wallace responded that Supervisor Dillon's situation involved unusual circumstances, and she was not able to tell staff what the sources of incomes were. Staff suggested that Supervisor Dillon run the entire 8-step analysis to see if the other steps might remove her from a conflict situation. However, she was unable to get the information she needed to analyze those steps. He noted that the law requires that those facts be gathered in order to do the analysis, and that the public should go through all of the steps of the 8-step process and not go directly to the "public generally" exception.

Mr. Wallace referred to the 1986 *Huffaker* advice letter, which addresses the size of a piece of property and establishes that it is a distinguishing factor, and that different size properties are not affected in the same manner. He noted that staff has been consistent with that letter, although they had never dealt with a scenario like Supervisor Dillon's situation before. He stated that her situation was unusual because the facts started to change as new segments were identified. There were different effects for each segment, and there was no way to identify whether the sources of income owned any property. He noted that residential properties were not affected until the ordinance was adopted.

Commissioner Karlan asked whether a worst case scenario could be hypothesized by staff for purposes of the 8-step analysis, since the facts were not available.

Mr. Wallace responded that the Act provides that sources of income are disqualified for 12 months after the funds have been received. The statute requires that the test not be applied to the effects on the supervisor's salary, but rather on the effects on the sources of income.

Commissioner Knox pointed out that Supervisor Dillon did not have the facts available to make a determination that is was reasonably foreseeable that the ordinance on setbacks would have any impact on her past sources of income. He asked how "reasonably foreseeable" intersected with the availability of information, and what measures are regarded as too extraordinary to require in order to make that determination.

Ms. Menchaca stated that the test is a factual determination. If the official provides facts and explains how those facts show that there will be no financial effect, then staff can make the determination and provide immunity. Sometimes public officials are unwilling to make those statements because they are not certain, and they often expect FPPC staff to determine that they meet the standards as if staff were appraisers.

Ms. Menchaca stated that, if public officials undergo a good faith effort to get the information for the determination, and they believe that the facts would support immunity, staff can render immunity. She sensed that they felt uncomfortable making that good faith statement.

Commissioner Karlan questioned whether, if the county counsel had asked Supervisor Dillon to describe everything she knew about the law firm's client base and how the client base would be affected, the county counsel could make the determination, based on the information available, that a conflict did or did not exist.

Chairman Randolph stated that Supervisor Dillon's issue is partly the uniqueness of her economic interest, which the Commission is not addressing in the regulation. She suggested that it could be dealt with at the staff level or through an opinion request, and that it could not be solved through the "public generally" exception as it relates to general plan amendments.

Mr. Westmeyer stated that her case was brought up to illustrate the impracticalities of dealing with complex scenarios that occur often when dealing with the regulations. He urged the Commission to change the regulations so they are more practical.

The Commission decided to continue the discussion after holding the closed session.

Items #7, #8, #9, #10, #12, #13, #14, #15, #16, #17.

Commissioner Swanson moved that the following items be approved on the consent calendar:

Item #7. ***In the Matter of Elihu Harris,*** **FPPC No. 98/271.** (1 count.)

Item #8. ***In the Matter of Western Alliance of Farmworker Advocates, Inc.,*** **FPPC No. 01/560.** (16 counts.)

Item #9. ***In the Matter of Robert Kudler and K&W Aviation*****, FPPC No. 01/443.** (1 count.)

Item #10. ***In the Matter of L.A. City and County School Employees Union, Local 99 C.O.P.E. and Janett L. Humphries*****, FPPC No. 01/187.** (1 count.)

Item #12. ***In the Matter of Julie Lopez Dad*****, FPPC No. 01/474.** (1 count.)

Item #13. ***In the Matter of Maria Villasenor*****, FPPC No. 02/403.** (1 count.)

Item #14. *In the Matter of Ronald Puls*, FPPC No. 02/440. (1 count.)

Item #15. *In the Matter of Derek Rhody*, FPPC No. 02/544. (1 count.)

Item #16. *In the Matter of Cynthia Crann*, FPPC No. 02/370. (1 count.)

Item #17. *In the Matter of Michael Rue*, FPPC No. 02/543. (1 count.)

Commissioner Downey seconded the motion.

Commissioners Downey, Karlan, Knox, Swanson and Chairman Randolph voted "aye."

The motion carried by a unanimous vote.

Item #11. *In the Matter of Gordon A. Galvan and the Committee to Elect Gordon Galvan,* FPPC No. 00/670. (3 counts.)

Chairman Randolph abstained from the discussion of the item.

Commissioner Swanson moved approval of the stipulation.

Commissioner Knox seconded the motion.

Commissioners Downey, Karlan, Knox and Swanson voted "aye." The motion carried by a vote of 4-0.

The Commission adjourned to closed session at 12:55 p.m.

The Commission reconvened at 2:05 p.m.

Item #5 (Cont.). Pre-notice Discussion of Public Generally Regulations as Applied to General Plan Decisions.

Ms. Bocanegra asked the Commission whether staff should continue to pursue an alternative under steps 4 and 5 of the 8-step process. She noted that staff discussed an alternative in step 4 at an interested persons meeting, and there was very little interest. The interested persons believed that amending the "public generally" exception was a more viable approach since the presumption of no material financial effect because of indirect involvement could be rebutted.

Ms. Menchaca pointed out that page 10 of the overview memo included some proposed language staff previously considered providing that a decision involving the initial adoption of a general plan for an entire jurisdiction would not be directly involved. However, after further consideration, staff concluded that it would not be very helpful because there are usually specific circumstances that require disqualification.

Chairman Randolph stated that the Commission should decide whether the issue warranted further study and staff time and try to narrow the scope of the issue. She did not think the issue should be dropped yet, noting that there may be potential remedies.

Commissioner Knox agreed.

Chairman Randolph opined that the focus of the analysis could be dropped from steps 4, 5, and 6 of the analysis.

Commissioner Knox agreed that the problems did not seem to result from steps 4 or 5, but considered step 6, regarding what constitutes reasonable foreseeability, as an area that might provide a remedy to the concerns.

Commissioner Karlan observed that staff wanted to move as much of the determination out of step 7 and into the previous steps as possible. She agreed that the Commission should look for ways to allow officials to participate in the earlier steps of the analysis.

Chairman Randolph stated that more education might be the answer, instead of regulatory changes.

Commissioner Karlan agreed, and suggested that the Commission publish more detailed information about the 8-step process.

Commissioner Knox observed that more education alone will not answer the question of the degree of diligence an official must exercise to uncover the facts that may bear on whether the official has a conflict.

Ms. Bocanegra summarized that staff should explore the types of facts pertaining to general plans that would be necessary to ascertain in order to determine whether it is reasonably foreseeable that a financial effect will occur.

Commissioner Knox questioned whether Supervisor Dillon had a duty to identify the clients who paid her law firm $3,500 or more during the previous year, and then contact each of them to ascertain whether they owned property that backed up to a stream. He believed that was an unreasonable burden for a part-time civil servant. He believed that the Commission should identify what kind of effort should be made in a regulation.

Commissioner Karlan suggested that staff explore the interaction between indirect involvement and reasonable foreseeability for a possible solution. As an example, she noted that if there was only indirect involvement in a decision, staff could identify a level of obligation the official must fulfill to determine whether someone else is affected by the decision.

Chairman Randolph suggested that staff explore duty of care issue as a broader application that would apply to any governmental decision. She asked that staff develop a memo addressing the

duty of care for the next meeting, summarizing past analyses and discussion. She also requested that staff address the more narrow issue of general plans by focusing on step 7.

Chairman Randolph stated that the question of whether "substantially the same manner" should be defined by using dollar thresholds should be treated as two questions. The first question was whether "substantially the same manner" should be defined, and the second was whether the definition should have a dollar or factors approach.

Ms. Bocanegra stated that there seemed to be great difficulty quantifying whether a certain dollar threshold would be met, and staff believed that a dollar threshold would not be a good idea and might even exacerbate some of the San Diego concerns.

In response to a question, Commissioners Knox and Swanson supported the idea of considering proposals to define, "substantially the same manner."

Commissioner Downey stated that it would be useful, noting that he was piqued by the "manner" versus "degree" discussion.

In response to a question, Commissioner Knox stated that he did not know how dollar thresholds could be done, since the notion of "substantially the same manner" requires some sort of comparison. He did not see how dollar comparisons would work.

Commissioner Swanson asked that staff present scenarios both with and without dollar thresholds.

Ms. Menchaca suggested that it might be better to leave it open. She noted that, if the Commission wanted "proportionality" explored, caps may need to be set.

Chairman Randolph stated that it would be left open, and that staff may or may not propose dollar thresholds.

Commissioner Karlan asked whether an official must make public that they are participating in a decision even though they have a conflict because it fits in the "public generally" exception.

Ms. Menchaca stated that they may, but that it was not required.

Commissioner Karlan asked whether it would be advisable to create that requirement, especially if the Commission chooses to relax the "public generally" rule.

Commissioner Knox asked whether there was legal authority to do so.

Ms. Menchaca stated that prior regulations required disclosure of the economic interest that resulted in disqualification, but the Commission decided to change that to a permissive disclosure. New legislation requires § 87200 filers to make specific disclosures. If the Commission chose to create the new requirement, it would mean that there are 3 tiers for public

disclosure: one where it is totally permissive to disclose anything; one where disclosure would be required when it involved the "public generally" exception; and another for § 87200 filers who would have to make the disclosure in a particular manner in a public meeting. However, staff could explore the option.

Chairman Randolph observed that it could become very burdensome for those officials who, many times, have "garden variety" conflicts when they use the exception.

Commissioner Karlan questioned whether those officials might have jumped to step 7 rather than using the earlier steps of the analysis, and that they may not have a conflict at all.

Chairman Randolph agreed. She did not want to explore the public disclosure option.

Commissioner Knox was willing to have staff explore and discuss the option, providing the Commission would have the authority to require the public disclosure.

Mr. Glick stated that it was helpful to know that San Diego and Napa's concerns did not extend to looking for the exception to apply to specific development projects or adoption of a specific plan, and that all counties in California have already adopted general plans.

Chairman Randolph stated that she would support San Diego's concept of either an adoption or a comprehensive amendment, but not a specific amendment.

Commissioner Karlan stated that it could be done when the counties do their 10-year comprehensive amendments.

Chairman Randolph pointed out that the staff proposal has that language.

Mr. Glick stated that the government code only mandates updating 1 of the 7 required elements on five year staggered terms.

Chairman Randolph disagreed, noting that she thought the entire plan needed to be updated every 10 years.

Commissioner Knox stated that it should be approached as a single set of conflict rules governing all of the public official's decisions, and not a separate set of rules for general plan or general plan amendments.

Commissioner Swanson stated that the issue involved very large parcels of land, where all the other cases may not deal with such extensive amounts of influence.

Commissioner Knox observed that if it deals with one parcel, the "significant segment" analysis would not be done, and the issue would take care of itself.

Chairman Randolph stated that if the Commission amends the regulation to allow the "public generally" exception to be applied much more frequently, then it might be a good idea to limit the scope. She noted that the issue comes up in the context of a general plan because it is a broad policy document that applies throughout the jurisdiction, has overriding policies and goals that are then subsequently implemented through more specific action, and almost everyone in the jurisdiction has an economic interest in the issue. The issue arose out of the question of whether it should be made easier for all of the officials to participate.

Commissioner Knox noted that the general plan presents the most complex difficulties in applying the "public generally" exception because of the difficulty in determining what a "significant segment" is and measuring what is meant by "substantially the same manner." He believed that the principles the Commission adopts ought to be applicable to smaller decisions. He suggested an approach that did not create a special section of regulations just for the analysis of conflicts of interests and the "public generally" exception in connection with general plans.

Mr. Wallace stated that the proposal was not intended to repeal the existing "public generally" rule. He noted that the comments to the Commission highlighted the unique nature of the general plans, which may make them worthy of some sort of separate exception. He explained that there are separate exceptions in the regulations for rates, water, and appointed boards and commissions, noting that it was not unusual to have a specific rule based on the unique nature of a decision.

Ms. Menchaca stated that staff could look for similarities in the approaches, and whether staff would want to recommend one of the approaches.

Commissioner Knox stated that whatever is done for general plan decisions ought to at least be applicable to other land use decisions.

Ms. Menchaca stated that it would be difficult to reconcile the two, because the general plan is pure planning. When decisions affect particular parcels, it may not be appropriate to have the same kind of rule. She believed it is difficult to obtain concrete facts when the decision involves pure planning. However, with decisions involving specific parcels, the facts should be available to be applied.

Chairman Randolph added that the general plan is pure long-range planning that may cover the next 5 or 10 years, making it difficult to determine what is foreseeable. She suggested that, if the issue is resolved focusing on "substantially the same manner," then there may not need to be a separate regulation for general plans. If an easier way to apply the "public generally" exception can be developed, further action may not be necessary.

Commissoner Knox stated that a unified and consistent approach would be better than one that treats some land use planning one way and other land use decisions another way, however he was prepared to be persuaded to the contrary.

Chairman Randolph pointed out that, if the Commission finds a way to make it easier to apply the "public generally" exception, there may not be a need for a separate general plan regulation.

With regard to decisions affecting any economic interest or only one or more of principal residence or business entity, Commissioner Knox stated that the cases involving the avocado farmer and the lawyer illustrated the importance of taking a broad approach to the question.

Chairman Randolph stated that the longer list of economic interests should be left in at the present time.

Chairman Randolph stated that anything that relates specifically to general plans should have stand-alone rules, but noted that the general rule and the issue of "substantially the same manner" would be further explored too.

Mr. Glick asked whether the San Diego proposal should be brought back as a viable proposal, or whether it should be included as a focus document.

Commissioner Swanson stated that she preferred that it be treated as a focus document.

Chairman Randolph stated that a single proposal should be brought back to the Commission, noting that the San Diego proposal goes farther than the Commission is prepared to go. The proposal should be included as part of the discussion, but not as a proposed regulation.

Mr. Glick stated that the "factors" approach to defining "substantially the same manner" was not necessarily meant to be a stand-alone regulation, but could be in combination with proportionality or any other issues the Commission wanted to include.

Chairman Randolph thought it was a good idea to combine it with something more definitive, such as proportionality.

Ms. Bocanegra pointed out that the current "factors" proposed language was permissive, and asked whether the Commission wanted the regulation to state that the "substantially the same" test is met if the factors are present.

Commissioner Knox stated that a "safe harbor" would be desireable, but there should also be guidance in addition to a "safe harbor."

In response to a question, Ms. Bocanegra stated that regulation 18704.2 provided an example of a provision that addresses zoning issues in step 4-the direct/indirect test. She observed that it was difficult to come up with a checklist including all the different facts that matter in a general plan decision.

Commissioner Swanson stated that a checklist can be useful, but should not preclude consideration of another factor that is not included on the checklist.

Commissioner Karlan observed that a "safe harbor" would provide that, if everything is checked off of the list, the official would not be disqualified and can vote. There could also be other people who can also vote who satisfy some other definition not on the checklist. However, it would be a safe harbor and if the factors on the checklist are met the official would not be disqualified. She questioned whether there was a way to harmonize the positions of Commissioner Swanson and Commissioner Knox.

Mr. Glick suggested the positions could be harmonized, noting that there are certain factors that are so core and central to assessing an economic effect that they could make up the safe harbor list. Another set of factors could be developed, to substitute for factors that could not be met on the safe harbor list, as a safety net.

Chairman Randolph stated that the safe harbor list could start looking like a standard of care, which might not be a bad result.

Chairman Randolph stated that she saw no reason to limit the regulation to scenarios where an official has only one economic interest affected by the decision.

In response to a question, Mr. Glick stated that staff was seeking guidance regarding what types of decisions should be addressed in proposed regulation 18707.10, ie. land use decisions, some or all general plan decisions, or a particular type of general plan decision.

Chairman Randolph stated that staff should not take any elements out.

Mr. Glick noted that a 10-year update might be considered a type of decision, and the Commission may want to address it.

Chairman Randolph agreed that it needed to be addressed.

Chairman Randolph stated that she did not think that there needed to be any qualification as to who initiates the decision if the decision is narrowed to include only comprehensive amendments to actual elements.

Commissioner Knox requested that staff examine proportionality.

In response to a question, Ms. Bocanegra stated that a "fail safe" cap could be considered in the context of the proportionality rules that staff develops.

Commissioner Knox agreed that he would like to consider it as an option.

Chairman Randolph stated that she did not think it was necessary to limit the applicability to situations where the rest of the rule is inapplicable. She noted that, once someone gets to the "public generally" exception, they have already either determined that the general rule does not apply and a more specific rule is necessary, or the general rule applies and the same result is reached anyway.

Commissioner Downey observed that the official might not be sure that the general rule applies.

In response to a question, Ms. Menchaca stated that staff would like to have at least one more Interested Persons meeting before bringing the regulation back to the Commission.

In response to a question, Commissioner Randolph asked that staff bring back the segmentation issue.

Ms. Menchaca noted that it could be brought back separately from the other proposals, and may be brought back earlier.

Chairman Randolph suggested that segmentation has long been staff advice, and that codifying it would make it easier for the public to find and use. She agreed that it should be done regardless of what happens with the other issues.

There was no objection to the Chairman's suggestion.

Ms. Bocanegra stated that the proposed language in the staff memo was the same language that staff regularly includes in advice letters, and has been used for 20 years.

Commissioner Downey suggested that the segmentation issue be brought back as a pre-notice issue.

Chairman Randolph asked staff to bring segmentation back for the Commissioner's consideration without waiting for the other issues to be resolved.

Commissioner Downey stated that the Commission was trying to deal with the issue in a manner that protected the elections and day-to-day operations of the political system. He noted that the FPPC was charged with being mindful of conflicts of interest and not allow inroad where alternatives exist.

In response to a question, Ms. Menchaca stated that the standard of care issue could be brought back separately from the general plan issue, noting that it would bring in a different constituent group.

Commissioner Karlan asked that staff provide more guidance in determining when decisions fall into the other parts of "inextricably intertwined." As an example, if an area is going to be upzoned, another area might be downzoned, and she asked if that was what was considered conditions precedent or subsequent.

Item #6. Regulatory Calendar – Work Plan Revisions.

Mr. Wallace explained that staff's proposed changes to the regulatory calendar are minor in nature as they shift projects around to deal with staff shortages and meeting cancellations. He

noted that staff now proposed moving the "affiliated entities" project to a pre-notice hearing in December 2003. This would push adoption to early in 2004. This was a change to the proposed calendar.

Mr. Wallace explained new items. First, he explained that a recall election project was added to the calendar. He stated that a state candidates who is the target of a recall election is exempted from contribution limits, and noted that recall committees and fundraising have consistently raised unusual and unique issues for the Commission. Staff proposed that a regulation be adopted in July to codify the fact sheet and clarify a few other issues.

Second, Mr. Wallace stated that a December 2003 pre-notice hearing will deal with § 84308, a disqualification rule, and will be paired with the "affiliated entities" project because they have similar issues. Both regulations ask under what circumstances would two entities be treated as a single entity for purpose of a specific limit or threshold.

Third, Mr. Wallace recommended that regulation 18901 not be considered at the current time. He explained that Senator Ross Johnson asked staff to look again at some of the definitions. Senator Johnson was not able to be at the Commission meeting on this date, and asked that the discussion be postponed. He asked the Commission to consider looking at that request in September 2003.

Chairman Randolph suggested that the regulation calendar be adopted as is, but that the issue could be brought up again in September.

Chairman Randolph asked that staff add "segmentation" to the regulation calendar.

Ms. Menchaca suggested that it could be discussed at the August meeting for second pre-notice discussion. The adoption could take place in September or October, but she cautioned that October already had a number of regulatory items scheduled.

There were no objections from the Commission to the regulation calendar as changed.

Item #18. FPPC Resolution.

Chairman Randolph explained that the resolution honored the contributions of former Commission Chairman Karen Getman.

Commissioner Downey stated that the resolution was well-deserved for Chairman Getman, noting, in her own words, that "she got it right."

Commissioner Downey moved adoption of the resolution.

Commissioner Knox seconded the motion.

Commissioners Downey, Karlan, Knox, Swanson and Chairman Randolph voted "aye." The motion carried unanimously.

Item #19. Publications Schedule – Work Plan Revisions.

There was no objection to accepting the revisions as proposed.

Item #20. Legislative Report.

The Legislative Report was accepted as submitted.

Item #21. Executive Director's Report.

The Executive Director's Report was accepted as submitted.

Item #22. Litigation Report.

Ms. Menchaca reported that the District decided not to appeal the *Hanko* decision.

The meeting adjourned at 3:00 p.m.

Dated: July 10, 2003.

Respectfully submitted,

_____
Sandra A. Johnson
Executive Secretary

Approved by:

_____
Chairman Randolph